ORAL ARGUMENT SCHEDULED FOR OCTOBER 14, 2011

No. 10-7174

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

McKESSON CORP., et al.,
Plaintiffs-Appellees,

v.

ISLAMIC REPUBLIC OF IRAN,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES

HAROLD HONGJU KOH
Legal Adviser
Department of State

TONY WEST
Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

DOUGLAS N. LETTER
(202) 514-3602
H. THOMAS BYRON III
(202) 616-5367
Attorneys, Appellate Staff
Civil Division, Room 7260
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. All parties, intervenors, and amici appearing in this court and the court below are listed in the Brief for Appellant, except that the United States hereby participates as amicus curiae.

(B) Rulings Under Review. References to the rulings at issue appear in the Brief for Appellant.

(C) Related Cases. References to related cases, as defined in this Court's Rule 28(a)(1)(C), appear in the Brief For Appellant.

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GLOSSARY

FCN Treaty:	Treaty of Friendship, Commerce, and Navigation
FSIA:	Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611
Hickenlooper Amendment:	22 U.S.C. § 2370(e)(1)-(2)
Iran Br.:	Brief For Appellant, D.C. Cir. No. 10-7174 (filed May 26, 2011)
McKesson Br.:	Brief For Appellees, D.C. Cir. No. 10-7174 (filed June 27, 2011)
McKesson I:	*Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990)
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INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a), the United States files this brief as amicus curiae.

The United States has a substantial interest in issues presented in this litigation that could affect the foreign relations of the United States: the interpretation of the federal statute governing foreign sovereign immunity to authorize creation of federal common law causes of action founded on theories of customary international law, the applicability of the act of state doctrine, and the interpretation that domestic courts give to international agreements to which our government is a party. "[T]he foreign policy implications of the application of [the Foreign Sovereign Immunities] Act obviously occasion a continuing involvement by the Executive." *Millen Indus., Inc. v. Coordination Council*, 855 F.2d 879, 881 (D.C. Cir. 1988) (explaining role of the

United States as amicus curiae). Likewise, this Court has recognized "the value of obtaining views of the Executive Branch in matters relating to the application of the act of state doctrine and giving appropriate weight to those views." *Ibid.*, quoted in *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 363 (D.C. Cir. 2007). And the views of the Executive concerning the interpretation of a treaty to which the United States is a party are entitled to deference. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982).

The United States has participated in this litigation previously, filing Statements Of Interest in the district court and participating as amicus curiae in an earlier appeal (No. 07-7113). The Overseas Private Investment Corporation, a federal agency, was originally a named plaintiff, and filed a Brief In Opposition to Iran's 2001 petition for a writ of certiorari in the Supreme Court.

STATEMENT OF THE ISSUES PRESENTED

The United States will address the following issues:[1]

1. Whether the commercial activity exception of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2), authorizes a United States court to create a federal common law cause of action against Iran by looking to customary international law.

2. Whether the act of state doctrine bars the judgment here against Iran.

[1] The United States takes no position on questions of Iranian law addressed by the parties.

3. Whether the Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, June 16, 1957, 8 U.S.T. 899, prohibits McKesson from pursuing its claims in a United States court.

STATEMENT OF THE CASE

In its remand order in the most recent appeal, this Court directed the district court to consider three issues: First, "whether McKesson has a cause of action under Iranian law"; second, whether customary international law "provides McKesson a cause of action"; third, "whether the act of state doctrine applies to this case." *McKesson v. Islamic Republic of Iran*, 539 F.3d 485, 491 (D.C. Cir. 2008) (*McKesson V*). As to the latter two questions, this Court directed the district court to "invite the views of the United States, whose interests may be implicated by those matters." *Ibid.*

In the district court on remand, the United States filed a Statement of Interest explaining that customary international law does not provide a cause of action cognizable in this case.[2] The district court nevertheless – and without referring to the position of the United States – concluded that the FSIA authorizes the court to look to customary international law to create a cause of action against Iran as a matter of federal common law. See 2009 Op. 7-10. The district court also held that the act of state doctrine is no bar to this litigation. *Id.* at 10-12.

[2] The Statement of Interest also explained that the applicability of the act of state doctrine would depend on the district court's specific determinations concerning any cause of action under Iranian law.

SUMMARY OF ARGUMENT

1. The district court mistakenly concluded that the FSIA commercial activity exception represents implicit congressional authorization for courts to create a new federal common law cause of action with reference to customary international law. Although the Supreme Court has interpreted the Alien Tort Statute, 28 U.S.C. § 1350, to authorize federal courts to fashion a federal common law cause of action based on the law of nations in certain limited circumstances, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004), neither the Supreme Court nor any court of appeals has applied the rigorous analysis of *Sosa* to conclude that any other federal statute – including any provision of the FSIA – shares that attribute.

The FSIA commercial activity exception, unlike the Alien Tort Statute, does not refer to the law of nations or international law. Nor does its authority or effectiveness depend on finding a cause of action in federal common law. The FSIA commercial activity exception determines whether the court has jurisdiction over a defendant, based on the absence of foreign sovereign immunity, not whether the plaintiff has a cause of action. In the 35 years since the FSIA's enactment, federal courts have heard a multitude of claims under the commercial activity exception without looking to federal common law or customary international law for a cause of action.

McKesson's contrary argument does not discuss the commercial activity exception. Instead, McKesson's brief relies principally on a different provision of the FSIA, the expropriation exception. But the expropriation exception has not been

invoked in this case, and its different terms do not suggest that Congress intended the commercial activity exception to authorize creation of a federal common law cause of action founded in customary international law.

2. The district court rejected Iran's defense based on currency controls, holding that this case solely concerns the corporate conduct of Iran's representatives on the board of directors of Pak Dairy. Based on that determination, the district court held that the act of state doctrine does not bar this litigation because the corporate decisions at issue here are not sovereign conduct.

The act of state doctrine applies only "when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 406 (1990). Assuming the correctness of the district court's decision rejecting Iran's currency controls defense, then it would follow that the corporate conduct at issue does not constitute official action by a foreign sovereign. The corporate decisions of Pak Dairy's board of directors bear none of the hallmarks of official action. The government of Iran did not pass a law, or issue an edict or decree, explicitly taking McKesson's property for the benefit of the Iranian public. Instead, Iran's representatives on Pak Dairy's board apparently exercised their corporate authority to deny McKesson its interest in Pak Dairy and its earned dividends. The conduct of a majority shareholder exercising its power through the board of directors of a corporation to shut out a minority shareholder is indisputably not a sovereign act, and is not entitled to the protection of the act of state doctrine.

3. Iran also argues that the Treaty of Amity should be read to bar this litigation against the government of Iran. While the usual course for an aggrieved investor would be to seek redress in the courts of the offending sovereign for actions that could constitute treaty violations, nothing in the Treaty of Amity precludes a United States national from bringing suit in this country. The text of the treaty and the practice of our courts in the last fifty years refute Iran's position. This Court should reject Iran's unsupportable reading of the Treaty of Amity.

ARGUMENT

I. THE FSIA COMMERCIAL ACTIVITY EXCEPTION DOES NOT AUTHORIZE A COURT TO CREATE A FEDERAL COMMON LAW CAUSE OF ACTION FOUNDED IN CUSTOMARY INTERNATIONAL LAW.

A. McKesson brought this action against Iran by invoking the jurisdiction of the FSIA, specifically the commercial activity exception to immunity under that statute, 28 U.S.C. § 1605(a)(2). See *McKesson V*, 539 F.3d at 491 (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449-451, 453 (D.C. Cir. 1990) (*McKesson I*); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350-351 (D.C. Cir. 1995) (*McKesson II*), cert. denied, 516 U.S. 1045 (1996)). In the most recent appeal, this Court directed the district court on remand to reconsider whether customary international law can be construed to provide a cause of action against Iran "in light of, *inter alia*, the Supreme Court's intervening decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)." *McKesson V*, 539 F.3d at 491.

The district court here erroneously held that the FSIA commercial activity exception authorizes a United States court to create a federal common law cause of action for expropriation under customary international law. See 2009 Op. 7-10. Neither the text of the commercial activity exception nor its legislative history in any way refers to claims founded in customary international law. The statute provides:

> "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case – in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

The FSIA commercial activity exception does not constitute the kind of exceptional grant of jurisdiction permitting federal courts to exercise residual judicial authority to fashion federal "common law claims derived from the law of nations." *Sosa*, 542 U.S. at 731 n.19. In particular, there is no basis to conclude – as the district court did here – that the commercial activity exception permits a federal court to create a federal common law cause of action for expropriation by reference to international law.

The Supreme Court in *Sosa* made clear that the Alien Tort Statute, 28 U.S.C. § 1350, is unusual in its contemplation that federal courts could create a federal common law cause of action based on customary international law in certain limited circumstances. The text of that statute explicitly contemplates a "civil action [brought] by an alien for a tort only, committed in violation of the law of nations or

a treaty of the United States." 28 U.S.C. § 1350. That language stands in sharp contrast to the FSIA commercial activity exception (quoted above), which refers to the commercial activity of foreign governments as a reason why the defense of foreign sovereign immunity is unavailable, but notably makes no mention of either causes of action or customary international law.

The majority in *Sosa* took pains to distinguish the Alien Tort Statute from the general grant of federal-question jurisdiction in 28 U.S.C. § 1331, which the Court determined did not permit courts to look to customary international law for the creation of a new federal common law cause of action. See *Sosa*, 542 U.S. at 731 n.19. The *Sosa* Court's extensive and careful scrutiny of the Alien Tort Statute demonstrates the unusual circumstances necessary to find that a jurisdictional statute authorizes federal courts to derive new causes of action from customary international law. See *id.* at 712-731. We are aware of no case in which a federal court has applied *Sosa* to find such an authorization in any other statute, including the FSIA.

B. The district court failed to acknowledge this essential point of *Sosa*. The decision below too quickly concluded that the FSIA commercial activity exception, "like the [Alien Tort Statute]," permits courts to "apply causes of action based on international law." 2009 Op. 8. Courts can generally look to international law when interpreting the terms of the FSIA. See *ibid.* (citing *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1294-1295 (11th Cir. 1999)). But that general proposition does not support the quite different determination that the FSIA commercial activity exception authorizes creation of a federal common law cause of

action derived from customary international law. *Aquamar* did not involve any claimed reliance on a cause of action based on customary international law; nor did that case involve claims under the FSIA commercial activity exception. Neither *Aquamar* nor any other case of which we are aware applied the analysis of *Sosa* to the FSIA commercial activity exception.

The district court quoted *Sosa* to suggest that a cause of action under the law of nations is generally available if Congress has not precluded it. See 2009 Op. 8-9 (quoting *Sosa*, 542 U.S. at 729, 731). But the quoted passages are not part of the Supreme Court's analysis of the particular reasons to read the Alien Tort Statute differently from other grants of federal jurisdiction, see *Sosa*, 542 U.S. at 714-724. Thus, the Supreme Court in *Sosa* "affirmed that the domestic law of the United States recognizes the law of nations" in "'appropriate circumstances.'" *Id.* at 729-730 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). And Congress had not expressly precluded the *Sosa* Court's interpretation of the Alien Tort Statute. *Ibid.* But those factors by themselves did not dictate the Court's interpretation of the statute. Indeed, the observations quoted by the district court here would apply equally to any grant of federal jurisdiction, including the federal-question statute, 28 U.S.C. § 1331, which the Court in *Sosa* specifically said does not authorize courts to create a federal common law cause of action founded in customary international law, see *Sosa*, 542 U.S. at 731 n.19.

The district court (2009 Op. 10) also pointed to a different provision of law: the FSIA expropriation exception, 28 U.S.C. § 1605(a)(3). But the expropriation

exception is not at issue in this case. See McKesson Br. 25 n.10. Even if the FSIA expropriation exception, like the Alien Tort Statute, could be read to permit a court to fashion a cause of action as a matter of federal common law by reference to customary international law, that result would not support the district court's erroneous determination that the commercial activity exception should be read to do the same.[3]

C. McKesson does not argue that the FSIA commercial activity exception, 28 U.S.C. § 1605(a)(2), itself bears any indicia of congressional intent to permit federal courts to create a federal common law cause of action founded in customary international law. Instead, McKesson's brief relies on other statutes, pointing to the language of the FSIA expropriation exception, 28 U.S.C. § 1605(a)(3), and to a statutory provision that antedates the FSIA altogether, 22 U.S.C. § 2370(e)(1)-(2) (the Hickenlooper Amendment, which contains some language similar to the FSIA expropriation exception). See McKesson Br. 24-27, 30-31. But those statutes are not the basis for the district court's jurisdiction in this case, and they do not answer the question of Congress' intent in enacting the FSIA commercial activity exception.

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[3] This case does not present the question whether the FSIA expropriation exception would permit a court to create a cause of action under federal common law. Nevertheless, the district court mistakenly asserted that this Court and the Ninth Circuit had so held. See 2009 Op. 10 (citing *Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934, 943 (D.C. Cir. 2008); *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1060 (9th Cir. 2009)). But neither decision purports to apply the *Sosa* inquiry to 28 U.S.C. § 1605(a)(3). And dicta in the Ninth Circuit's panel decision in *Cassirer* does not survive that court's grant of rehearing en banc, which does not address the question. See *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir. 2010) (en banc), cert. denied, __ U.S. __ (No. 10-786, June 27, 2011).

McKesson also suggests that the distinction between the FSIA commercial activity and expropriation exceptions should be disregarded for these purposes. See McKesson Br. 32-33. By seeking to isolate the FSIA's grant of federal jurisdiction in 28 U.S.C. § 1330(a) from the statute's enumerated immunity exceptions in 28 U.S.C. § 1605, McKesson improperly disregards the significance of the precise limitations Congress imposed in each of the separate statutory exceptions to foreign sovereign immunity, as set forth in § 1605(a)(1)-(6). The FSIA is not an atomized collection of disparate provisions, and the statute's jurisdictional grant – which explicitly refers to and requires a "claim for relief * * * with respect to which the foreign state is not entitled to immunity * * * under sections 1605-1607 of this title," 28 U.S.C. § 1330(a) – cannot be so readily divorced from the exceptions to immunity that themselves define and determine the scope of the jurisdiction over any such claim. Thus, Congress made clear that the FSIA expropriation exception applies only when specific conditions are satisfied, such as the requirement that the property taken (or property exchanged for the property taken) be present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or alternatively that the property be owned by a foreign state agency or instrumentality engaged in commercial activity in the United States. See, *e.g.*, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir. 2010) (en banc), cert. denied, __ U.S. __ (No. 10-786 June 27, 2011).

By contrast, the premise of the FSIA's commercial activity exception is that, under the "restrictive" theory of sovereign immunity, a foreign nation may fairly be

held liable for conduct that is "private or commercial in character" when it acts "in the manner of a private player within the market." *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (internal quotation marks omitted). Congress would have had little reason to expect that, in deciding whether a foreign state was liable for such private conduct, federal courts would have any need to create federal common law causes of action or otherwise look beyond the ordinary rules of commercial law that govern "private player[s] within the market." *Ibid.* The legislative history of the FSIA confirms that the statute was "not intended to affect the substantive law of liability." H.R. Rep. No. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610; see also, *e.g.*, *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 338 (D.C. Cir. 2003) (courts "have no free-wheeling commission to construct common law as we see fit" because the FSIA "instructs us to find the law, not to make it").

The FSIA's carefully delineated exceptions must be read as an integral part of the comprehensive statutory scheme Congress adopted. That scheme does not merely grant subject-matter jurisdiction over a specified category of cases, but addresses a wide variety of related and carefully linked subjects concerning claims against foreign sovereigns. Thus, the FSIA prohibits state as well as federal courts from exercising jurisdiction over any claim against a foreign state unless it comes within an exception to foreign sovereign immunity, and the statute also specifies rules for personal jurisdiction, venue, removal, and attachment and execution for cases that come within an exception.

The Supreme Court has emphasized that "subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), quoted in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 (1989). While the Court did not specifically address the question raised in this case, the emphatic and repeated references to the FSIA's "comprehensive [statutory] scheme," *e.g.*, *Amerada Hess*, 488 U.S. at 435 n.3; *Verlinden*, 461 U.S. at 496, refute McKesson's efforts to elide the significant differences between the FSIA commercial activity and expropriation exceptions.[4]

McKesson also suggests that the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), can be read to create a cause of action.[5] See McKesson Br. 30-31. But that statute is not a grant of jurisdiction, like the Alien Tort Statute or the FSIA, and it does not purport to enact or codify any cause of action. The Hickenlooper Amendment was intended to limit the Supreme Court's decision in *Sabbatino*

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[4] Dicta in *Texas Trading & Mill. Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), overruled on other grounds by *Frontera Resources Azerbaijan Corp. v. State Oil Co.*, 582 F.3d 393, 398-400 (2d Cir. 2009), cited in McKesson Br. 32-33 n.15, is not to the contrary. The court in *Texas Trading* held that there was jurisdiction under the commercial activity exception to hear a contract dispute; the Second Circuit did not purport to hold that a claim arguably contemplated by one FSIA exception (such as the expropriation exception, in this case) could be brought where the terms of that exception were not satisfied.

[5] The statute provides that "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted * * * based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of [a foreign state] state in violation of the principles of international law." 22 U.S.C. § 2370(e)(2).

concerning the applicability of the act of state doctrine to litigation concerning certain claims for expropriation. See, *e.g.*, *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1293-1294 (11th Cir. 2001). It says nothing about the source of any right to bring such claims in the first instance.

Moreover, the Supreme Court's decisions in *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Cort v. Ash*, 422 U.S. 66 (1975), cited in McKesson Br. 31, demonstrate the error of trying to find an implied right of action in the Hickenlooper Amendment. *Cort* and its progeny make clear that the Supreme Court has "sworn off the habit of venturing beyond Congress's intent" concerning implied private rights of action. *Alexander*, 532 U.S. at 287, cited in *McKesson V*, 539 F.3d at 490.

Like the district court, McKesson fails to understand the principal lesson of *Sosa*. McKesson's brief disregards the significance of the inquiry into whether a particular jurisdictional statute can be read to authorize federal courts to create new federal common law causes of action founded in customary international law. That inquiry in this case properly focuses on the FSIA commercial activity exception, and there is no indication that Congress imbued that provision with the same attributes as the Alien Tort Statute, which *Sosa* interpreted to give federal courts that authority in certain circumstances.

This Court recently reiterated the Supreme Court's call for "caution" in *Sosa*. See *Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1093 (D.C. Cir. 2011); see also *id.* at 1098 (Rogers, J., concurring) (citing "traditional principles of judicial restraint, especially in light of *Sosa*'s specific grounds for caution in the ATS context"). The

Court's recognition of the need for circumspection in the creation of federal common law causes of action properly extends as well to the first step of the *Sosa* analysis: whether the jurisdictional statute at issue contemplates such judicial lawmaking at all. Here, there is no occasion to reach the question whether a particular cause of action should be recognized (the issue in *Ali Shafi*), as the commercial activity exception to the FSIA does not contemplate such an inquiry at all.[6]

II. THE ACT OF STATE DOCTRINE DOES NOT APPLY TO THE CORPORATE CONDUCT AT ISSUE HERE.

A. Iran argues that the act of state doctrine prohibits United States courts from adjudicating this dispute. But the Supreme Court has explained that the act of state doctrine applies only "when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign." *Kirkpatrick*, 493 U.S. at 406; see also, *e.g.*, *Sabbatino*, 376 U.S. at 401 ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.").

[6] This is an unusual case, in which a plaintiff has invoked the FSIA commercial activity exception, rather than the expropriation exception, but contends that the commercial conduct of a foreign sovereign amounted to a taking in violation of international law norms. Expropriation claims of any kind brought under the FSIA commercial activity exception are unusual, although not unheard of. See, *e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 708-711 (9th Cir. 1992). But even *Siderman* did not involve a claim that the foreign government used corporate – rather than sovereign – conduct to effectuate an expropriation. Because this issue is unlikely to arise in many cases, this Court should be particularly hesitant to announce an extraordinary rule of law such as McKesson urges.

The district court determined that this litigation does not turn on the validity of Iran's currency control restrictions, but turns instead on the acts of Pak Dairy's board of directors. See 2010 Op. 5-6. Given that determination, there is no occasion to apply the act of state doctrine in this case because the conduct of Iran's representatives on Pak Dairy's board of directors cannot fairly be characterized as the sort of "official action by a foreign sovereign," *Kirkpatrick*, 493 U.S. at 406, or the "public acts [of] a recognized foreign sovereign power," *Sabbatino*, 376 U.S. at 401, to which the act of state doctrine applies.[7]

McKesson has characterized its claim as one for expropriation, but this is not a typical case of a foreign government acting in its sovereign capacity to take private property for a public purpose. As this Court explained, this case instead concerns claims that Iran's representatives on the Pak Dairy board of directors "cut off the flow of capital and other material to McKesson, froze out McKesson's board members, and stopped paying McKesson's dividends." *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1103 (D.C. Cir. 2001) (*McKesson III*), cert. denied, 537 U.S. 941 (2002), vacated in part on other grounds, 320 F.3d 280 (D.C. Cir. 2003). Those facts identify a pattern of conduct by representatives of the government of Iran that cannot properly be deemed the public or official acts of the sovereign government itself.

[7] Iran claims that the act of state doctrine would apply if this Court were to reverse the district court's determination that currency controls were not the basis for the expropriation at issue here. Iran Br. 34-45. The United States takes no position on the parties' dispute concerning the correctness of the district court's rejection of Iran's currency controls defense.

Iran's conduct had none of the hallmarks of official government action in the sovereign realm. Iran did not pass a law, issue an edict or decree, or engage in other formal governmental action explicitly taking McKesson's property for the benefit of the Iranian public. Instead, Iran's representatives on the board of directors exercised their corporate authority to deny McKesson its rights and dividends. The conduct of a majority shareholder exercising its power through the board of directors of a corporation to deny a minority shareholder the right to participate in and profit from its investment is not an official sovereign act. There is no indication – in light of the district court's rejection of Iran's currency controls defense – that the actions of Iran's representatives on Pak Dairy's board of directors were inextricably intertwined with the implementation of Iranian sovereign policy.

B. The Supreme Court has not defined the specific contours of the "official action" requirement of the act of state doctrine. But the concept is best understood to refer to conduct that is by its nature distinctly sovereign. The courts of appeals have held that genuinely and distinctly sovereign conduct should not be questioned by United States courts. Thus, this Court had "no doubt that issuance of a license permitting the removal of uranium from Kazakhstan is a sovereign act," and therefore held that the act of state doctrine barred litigation challenging the denial of such a license. *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002) (the "right to regulate imports and exports is a sovereign prerogative"). That case also held that a transfer of corporate shares to a state entity was likewise an act of state. *Id.* at 1166. Notably, and in direct contrast to the facts

in this case, the Court emphasized that "this transfer and alleged conversion were accomplished pursuant to an official decree of the Republic of Kazakhstan." *Ibid.* ("That kind of expropriation of property is the classic act of state addressed in the case law.").

Similarly, this Court has applied the act of state doctrine where a foreign government finance minister officially ordered payment of a tax to the foreign government. See *Riggs Nat. Corp. v. CIR*, 163 F.3d 1363, 1368 (D.C. Cir. 1999). That order was set forth in a "private letter ruling, which under Brazilian law binds the parties." *Id.* at 1366. More recently, this Court has applied the act of state doctrine to preclude a challenge to the validity of a foreign statute. *Society of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 102-103 (D.C. Cir. 2006).

Other circuits have similarly emphasized the sovereign character of official action subject to the act of state doctrine. See, *e.g.*, *Spectrum Stores v. Citgo Petroleum Corp.*, 632 F.3d 938, 954 (5th Cir. 2011) ("adjudication of this suit would necessarily call into question the acts of foreign governments with respect to exploitation of their natural resources * * * [which] is an inherently sovereign function"), pet. for cert. pending (No. 10-1371 filed May 5, 2011); *In re Philippine Nat'l Bank*, 397 F.3d 768, 773 (9th Cir. 2005) (applying act of state doctrine because litigation would require holding invalid a forfeiture judgment entered by Phillippine supreme court, in an "action initiated by the Philippine government pursuant to its statutory mandate to recover property allegedly stolen from the treasury," which Ninth Circuit described as "governmental") (internal quotation marks omitted);

Callejo v. Bancomer, 764 F.2d 1101, 1115 n.15 (5th Cir. 1985) ("Here, there is no question that Mexico's promulgation of the exchange control regulations was invested with the sovereign authority of the state. The decrees announcing the imposition of the controls were issued by the Mexican Ministry of Treasury and Public Credit and by President Lopez Portillo, and were later reiterated in legislative enactments."); *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984) (a country acts in a "uniquely sovereign" capacity when it "regulate[s] its natural resources").

Thus, the act of state doctrine generally prohibits United States courts from questioning the validity of a foreign government's exercise of its sovereign authority in a manner unavailable to private entities – such as by enacting a statute, promulgating an official decree, or issuing a binding administrative decision – or a foreign government's official action with respect to distinctly sovereign concerns, such as the regulation of natural resource exploitation. Here, the corporate decisions of Iran's representatives on Pak Dairy's board of directors do not come within those descriptions of sovereign activity, and the act of state doctrine accordingly does not apply.

C. We emphasize that the official action requirement is not equivalent to the determination of foreign sovereign immunity under the FSIA commercial activity exception. Nor does this case present the question whether there is a corollary commercial activity exception to the act of state doctrine. Resolution of that unsettled

question is not necessary to a decision that the act of state doctrine does not apply here.[8]

Even apart from the existence of such an exception,[9] a jurisdictional determination that the foreign government's conduct involved commercial activity under § 1605(a)(2) is not by itself a sufficient answer to the act of state inquiry. See *Callejo*, 764 F.2d at 1125-1126 (explaining that inquiries are distinct and applicability of FSIA commercial activity exception does not preclude determination that act of state doctrine applies). Notably, Iran does not appear to argue that the corporate decisions of its representatives on the Pak Dairy board of directors (to the extent the district court held that they were not compelled by currency exchange controls) constitute official actions of the government of Iran.

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[8] In 1976, a plurality of four justices would have held that "the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities" should not be deemed an official action (or public act) sufficient to trigger the invocation of the act of state doctrine. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976) (Op. of White, J.). But the dissent in *Dunhill* criticized the plurality's approach, observing that sovereign immunity and the act of state doctrine serve fundamentally distinct purposes. See *id.* at 725-728 (Marshall, J., dissenting); see also *id.* at 728 ("question[ing] the wisdom of attempting the articulation of any broad exception to the act of state doctrine within the confines of a single case"). Justice Stevens in his concurring opinion said nothing on the subject of any commercial activity distinction. See *Dunhill*, 425 U.S. at 715 (Stevens, J., concurring).

[9] This Court has previously recognized that "[t]he existence of such an exception is an unsettled question that this court has never addressed." *World Wide Minerals*, 296 F.3d at 1166. Some other circuits have explicitly rejected a commercial activity exception to the act of state doctrine. See *Honduras Aircraft Registry, Ltd. v. Honduras*, 129 F.3d 543, 550 (11th Cir. 1997); *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981). No court of appeals has recognized such an exception.

Apart from the question of a commercial activity exception, the Supreme Court's decision in *Dunhill* provides an instructive example applying the public act (or official action) requirement of the act of state doctrine. There, the majority – including Justice Stevens, who did not endorse a possible commercial activity exception – declined to "draw * * * [the] conclusion" that "the conduct in question was the public act of those with authority to exercise sovereign powers." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976). The Court pointed out that "[n]o statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers." *Id.* at 695. The same can be said for the conduct at issue in this case.

Applying this threshold analytical inquiry – identifying whether the outcome of the litigation would turn upon the effect of official action by a foreign sovereign – demonstrates that the act of state doctrine does not apply according to the terms set forth by the Supreme Court in *Kirkpatrick*. That determination also precludes any need to address McKesson's arguments (McKesson Br. 47-52) about whether any possible exception to the doctrine – such as under the Treaty of Amity or the Hickenlooper Amendment – might preclude application of the act of state doctrine in this case.

III. THE TREATY OF AMITY DOES NOT PRECLUDE THIS LITIGATION.

Finally, Iran urges this Court to hold that the Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, June 16, 1957, 8 U.S.T. 899, bars this litigation. See Iran Br. 8-24. The nature and scope of that argument are unclear in Iran's brief. Iran appears to argue that the Treaty of Amity bars litigation in United States courts concerning this claim for a taking of McKesson's property, without identifying clearly whether the treaty should be read to prohibit all such claims or only certain claims.[10] In any event, the language of the Treaty of Amity does not support such a sweeping prohibition of litigation in the courts of the United States.

Iran relies principally on the right of access to the courts guaranteed by Art. III, cl. 2 of the Treaty of Amity, which provides:

> "Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done." 8 U.S.T. 902-903.

That language does not purport to prohibit a United States company from bringing suit in a court in this country when jurisdiction and a cause of action exist. It only requires Iran to ensure that a United States company may, if it chooses to do so, bring

[10] Notably, this Court has already held that the Treaty of Amity does not create a cause of action as a matter of United States law. See *McKesson V*, 539 F.3d at 491. And we have explained above that the FSIA commercial activity exception does not authorize federal courts to create a cause of action under federal common law. The United States takes no position on McKesson's reliance on a cause of action under Iranian law.

suit (or defend against a suit) in Iranian court. As this Court recognized in 2001 (in a related, though distinct, context), "although this language suggests that one party will receive protections within the territory of the other party, it doesn't say that those protections can only be enforced in the territory of the other party." *McKesson III*, 271 F.3d at 1108, vacated, 320 F.3d 280.

Iran also points to dispute-resolution provisions in the Treaty of Amity that require the United States or Iran to attempt a diplomatic resolution of any disputes between the two governments and, failing that, to submit their disagreement to the International Court of Justice. See Iran Br. 11, quoting Treaty Art. XXI, cl. 1-2. But that intergovernmental dispute-resolution procedure does not purport to restrict the rights of a national of one country to seek judicial redress against the other government in the courts of either country. Here too the language of the treaty does not support Iran's interpretation.

The language of the Treaty of Amity between Iran and the United States is not unusual. This treaty is an example of a Treaty of Friendship, Commerce, and Navigation (FCN Treaty) negotiated between the United States and many of its trading partners over the first two centuries of our Nation's foreign relations. See Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 231 (1956) (first FCN Treaty concluded in 1778 with France); Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805 (1958). Iran's argument is all the more extraordinary – and sweeping – to the extent it suggests that

language found in multiple treaties with a wide range of foreign governments should be read to preclude suit against those governments in our courts. The United States has never taken such a position, and any decision along those lines could cause serious harm to the foreign policy of the United States.

Moreover, the novelty and breadth of Iran's argument counsels circumspection. If Iran's interpretation of the Treaty of Amity were correct, it would have precluded virtually all litigation in United States courts against Iran, including widespread claims brought following the President's blocking of all Iranian property and interests following the seizure of the United States embassy in Tehran in 1979. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981). We are not aware of any other case suggesting that the Treaty of Amity would have such a sweeping effect. The passage of over half a century without judicial acceptance of Iran's interpretation of the Treaty of Amity is itself a reason to doubt its validity.

If there were any doubt about the meaning of the Treaty of Amity, this Court should give "great weight" to "the meaning attributed to treaty provisions by the [United States] Government agencies charged with their negotiation and enforcement." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982), quoted in *Iceland S.S. Co., Ltd. – Eimskip v. Department of Army*, 201 F.3d 451, 458 (D.C. Cir. 2000); see also, *e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). Even where the parties to a treaty disagree about its interpretation, [the Executive] has wide latitude in interpreting the [treaty], and [this Court] will defer to its reasonable interpretation." *Air Canada v. DOT*, 843 F.2d 1483, 1487 (D.C. Cir.

1988). Here, the United States has consistently refuted Iran's view of the Treaty of Amity, including in a related dispute between the governments of the United States and Iran before the Iran-U.S. Claims Tribunal. See Statement of Defense of the United States, at 33-36 (No. A/24 Nov. 17, 1988). This Court should give great weight to the consistently stated position of the Executive concerning the meaning of the Treaty of Amity.

CONCLUSION

For the foregoing reasons, this Court should hold that the FSIA commercial activity exception does not authorize courts to look to customary international law for a cause of action under federal common law. The Court should also reject Iran's arguments that the act of state doctrine or the Treaty of Amity bars this litigation.

Respectfully submitted,

HAROLD HONGJU KOH
Legal Adviser
Department of State

TONY WEST
Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

DOUGLAS N. LETTER
(202) 514-3602
H. THOMAS BYRON III
(202) 616-5367
Attorneys, Appellate Staff
Civil Division, Room 7260
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2011, I electronically filed the foregoing Brief For The United States As Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Counsel for the parties listed below are registered CM/ECF users, and have been served by the CM/ECF system:

Thomas G. Corcoran, Jr., Esq.
Berliner, Corcoran & Rowe, LLP
1101 Seventeenth Street, N.W., Suite 1100
Washington, D.C. 20036

Mark N. Bravin, Esq.
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006

/s/ H. Thomas Byron III
H. THOMAS BYRON III
Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I hereby certify that the foregoing Brief For The United States As Amicus Curiae In Support Of Appellees complies with the type-volume limitation of FRAP 32(a)(7)(B). The brief is proportionately spaced, printed in Times New Roman font in 14 point typeface, and contains 6,910 words, as counted by WordPerfect X5.

/s/ H. Thomas Byron III
H. Thomas Byron III